Contracts Outline

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# Enforceability

By the end of the sixteenth century, courts had settled on the benefit/detriment theory of consideration in which the promisor must receive a benefit and the promisee must suffer a detriment.

## General Principles of Consideration

* Restatement § 17, 71: Contracts must be bargained for.
  + May bargain for either a promise or performance.
  + Need a promise first, then Performance can be:
    - An act other than promise
    - Forbearance
    - Creation/Modification of a legal relation
* Restatement § 73: Performance of a pre-existing legal duty owed is not consideration. A similar performance is.
* Restatement § 76: Conditional promises are not consideration if the promisor knows the condition cannot occur.
* Restatement § 79: the court does not inquire into the adequacy of consideration as long as it is clear that it is not a sham.
  + Trier of fact must be able to conclude one reason why the promisor made the promise
* **Bilateral contract:**  both sides have obligations; both sides may breach.
  + Restatement § 75–Promises are sufficient consideration.
* **Unilateral contract:** offer is accepted by way of performance; offerree never has an obligation. Just about always involve a *condition*.
  + Becomes binding when the service is rendered.
* Gratuitous Promises: no bargain.
  + If the promisor doesn’t know that the exchange is mere pretense for a gratuitous gift, there is no consideration.
  + In some states, a seal is still effective to make a gratuitous promise enforceable.
  + May be enforceable if doing so would remove a technical bar (time limit) to an otherwise valid contract (R. § 82).

## Family Contracts

* Traditionally, a promise between family members was unenforceable because courts assumed they were founded in altruism, not bargain.
* General rule: a promise to make a gift is unenforceable.

### Hamer v. Sidway, 1891 (page 34)

Facts: Uncle W.E. Story promises $5,000 to his nephew if he will refrain from drinking, tobacco, swearing, etc. Uncle dies before it is paid. Nephew assigns the debt to Hamer, who brought suit against Sidway, the executor of the Uncle’s estate.

Holding: For the plaintiff; the $5,000 must be paid by the estate.

Rationale: The abandonment of a legal right is sufficient consideration to uphold the promise.

**Rule: Surrendering one’s freedom of action is sufficient consideration for a promise.**

## Past Performance as Consideration

### Feinberg v. Pfeiffer co., 1959 (p.46)

Facts: Board of Directors promises $ 400/mo. pension if Π chooses to retire. After receiving payments for years, the company stops paying.

Holding: Π’s contention that her continuation in her position for a year and half was consideration is *not enough to constitute valid consideration*.

Rationale: She was not required to work for any time. There was no detriment to the Π so it cannot be argued that there was a bargain.

**Rule: Past performance does not constitute consideration.**

* Consideration cannot be based on past performance (you can’t bargain for something you already did).
* Both sides must *seek something*. One cannot say “bring us a peppercorn and you’ll get a pension.”
* Though courts do not inquire into the adequacy of consideration (see *King County v. Taxpayers of King County*, p.40 with Mariner’s stadium), both sides must seek something.
* To distinguish if a bargain is more than nominal, ask “would anybody want this in return?” This will fulfill §71.

## The Bargain Requirement

**Rule: The parties must be seeking something for consideration to be valid.**

### Kirksey v. Kirksey, 1845 (p.56)

Facts: Brother-in-law writes to widow and invites her to have a piece of his land. He later removes her to a further piece and then later asked to leave altogether.

Holding: Π’s act of packing up and moving 60 miles is *not* sufficient consideration to constitute a bargain. This is a gratuitous promise.

Rationale: There was no benefit to the landowner; he was not seeking anything. Thus, there was no bargain.

* An act or promise can be a bargain even if one has other motives for doing it. §81.
* Father who offers to buy a ring for his daughter if she will come to meet him for lunch: the meeting *is* consideration because the father gets a benefit out of seeing his daughter (p.57). Not the case if he offered the same to a stranger.
* Tropicana casino case: adequate consideration exists for a casino-goer who swiped her card, giving up information, to receive a million dollar prize that she won from spinning a wheel.

## Employment Agreements

**Rule: Continuation of at-will employment may constitute consideration for another contract.**

### Lake Land Employment Group of Akron, LLC v. Columber, 2004 (p.58)

Facts: Δ, an at-will employee was asked to sign a noncompete agreement. He contends that there was no valid consideration for the agreement because he received nothing in return.

Holding: The agreement was valid.

Rationale: Consideration could be found in the employer’s decision not to terminate the at-will employment immediately. Since the employment is at-will, there is valid consideration by the employee coming in to work every day. There is an implicit promise not to fire by asking him to sign the contract.

Dissent: Justice Resnick argues that the employee received absolutely no benefit and the employer suffered no detriment (it is simply better off than before). Justice Pfeifer argues that one day’s salary is not sufficient consideration for a three-year noncompetition agreement.

* Employee handbooks, on the other hand, may constitute unilateral contracts that may be accepted by the employee’s continuation in the position. p.65
  + Different public policy. Courts want to refrain from restraining trade so it is more skeptical toward noncompetition agreements.
  + Employers must provide consideration for a modification to handbooks. p.65

## Rewards

* A reward offer may be accepted by anyone who performs the service called for when the acceptor knows that it has been made and acts in performance of it.
* If you don’t know about the reward, you can’t collect even if you perform. *Broadnax v. Ledbetter*, 99 S.W. 1111 (Tex. 1907).
* In terms of Restatement § 71(2): the service was not rendered in exchange for the promise.

## Illusory Promises

* R. § 77: when promisor has alternatives, it is generally an illusory promise unless each alternative would be bargained for alone.
* General rule: promise must bind promisor to do something.
* In a case where B has made no promise to buy (just locked in a price), the promise is illusory and unsupported.
* An illusory promise is one that cannot be bargained for (but a “satisfaction” clause does not render a promise illusory).
* Agreements that allow either party to terminate at any time, at will, are illusory. p.86. UCC § 2–309(3): reasonable notice also required.

**Rule: Promises which do not result in anything are illusory and not sufficient for purposes of consideration.**

### Strong v. Sheffield, 1895 (p.69)

Facts: Mrs. Sheffield verbally agreed to endorse her husband’s debt in exchange for a promise it would not be sold away.

Holding: A verbal promise to forbear is not sufficient consideration so Mrs. Sheffield’s promise is not valid.

Rationale: Assuming she was only seeking a performance, there was no way to perform. The promise that “I’ll do it unless I don’t,” is an illusory one. Sheffield makes the *offer* to sign if Strong will forbear. The promise she was seeking is too open-ended to be a real promise.

## Satisfaction Criteria/Illusory Promises

**Rule: Contracts which are conditioned upon “satisfaction” must involve objective criteria. They are not illusory and induce a good faith obligation to meet the contractual obligation.**

### Mattei v. Hopper, 1958 (p.72)

Facts: Mattei contracts to buy land from Hopper, subject to his satisfaction in finding tenants within 120 days. Being satisfied, Mattei acts on the agreement and requests the title.

Holding: A promise subject to the buyer’s “satisfaction” is valid in cases involving objective satisfaction. The buyer must seek the tenants in good faith.

Rationale: The promise is not illusory because the buyer has a duty to seek the satisfaction in good faith. (Illusory promise would require a showing that neither side got something out of the deal—a stretch in this case). This is not a subjective promise; we can find some way to say “this guy didn’t keep his promise.”

## Implied Contracts

**Rule: Exclusive dealings contracts impose an obligation by the seller to promote the goods with best efforts. UCC § 2-206.**

### Wood v. Lucy, Lady Duff–Gordon, 1917 (p.83)

Facts: Gordon enters into an exclusive contract for Wood to sell her endorsement. She sells her own and he sues for breach. Gordon claims there is no contract because Wood did not bind himself to anything.

Holding: There is an implied contract because the Wood had an implied duty to seek out sales.

Rationale: An implied contract is the only way to make sense of the parties’ actions.

## Reliance and Promissory Estoppel

**Rule: Promises which induce a change in position on the part of the offeree may be enforced on the grounds of promissory estoppel.**

* **Elements of Promissory Estoppel (R. § 90):**

1. **Promise**
2. **Reasonably expected to induce action**
   1. **We presume this element in charitable subscriptions and marriage settlements.**
3. **Reliance**
4. **No other way to prevent the injustice; justice may be limited by case.**

* This softens the blow of the harsh consideration rule by ensuring that anyone who is harmed by lack of consideration will be compensated.
* Restatement § 90 provides that remedy may be limited as justice requires.
* For charitable contributions, enforcement may be found by finding an exchange among donors for the benefit of the charitable organization. p.92-93. Some reliance must be found, generally.
* Damages are limited to what is reasonably foreseeable. See p.96
* Cyberchron: reliance on statement that a contract is forthcoming can result in recovery under P.E.
* Red Owl: lost profits are not recoverable under P.E.

### Ricketts v. Scothorn, 1898 (p.89)

Facts: Ricketts promises money to Scothorn so that she would not have to work. She began going back to work. When Ricketts died, Scothorn brought action against the estate for the unpaid promise.

Holding: Ricketts’s promise induced a change in behavior in reliance on Scothorn’s part. It should be enforced.

Rationale: The behavior was in reliance on the money; since her behavior was influenced by the promise, promissory estoppel should apply. Reliance blocks a defense of “no consideration” even though this is a gratuitous promise.

**Rule: Expectation damages are used for Promissory Estoppel.**

### Feinberg v. Pfeiffer Co. (again), 1959 (p.94)

Facts: Same as above. Employee promised money after retirement and payments stop after a while.

Holding: Plaintiff did act in reliance, creating justification for enforcement on grounds of promissory estoppel.

Rationale: Plaintiff’s illness is not the grounds for enforcement; it is the action of reliance which mandates enforcement. Her expectation damages would involve the time when she could have been working the “lucrative position.”

**Rule: Promissory Estoppel may *only* be used when it is the only way to prevent injustice.**

### Cohen v. Cowles Media Company, 1992 (p.98)

Facts: Newspaper revealed the identity of a campaign staffer, who was then fired by his advertising firm. He sued for breach of contract with the newspaper.

Holding: The parties were not thinking of a legally binding contract and enforcement would violate the newspaper’s first amendment rights *but P.E. is the only way to prevent injustice*.

Rationale: The behavior was in reliance on the money; since her behavior was influenced by the promise, promissory estoppel should apply. Reliance blocks a defense of “no consideration” even though this is a gratuitous promise.

### D & G Stout, Inc. v. Bacardi Imports, Inc., 1991 (p.100)

Facts: Stout (General) was assured by Bacardi that it would continue to be a distributor during discussions with National (who wanted to buy General). When Bacardi reconfirmed its commitment to stay with General, General turned down National’s offer. Bacardi then cancelled the contract and General went bankrupt.

Holding: General had a reliance interest in Bacardi’s promise and that promise is legally enforceable. Reliance damages are appropriate for at-will contracts.

Rationale: Perhaps Bacardi is seeking the performance that General not sell to National—this is the bargain needed. We’re not talking about loss of profit, we’re talking about loss of negotiating leverage. There must be some expectation if you’re relying on it.

## Martial Agreements

* We assume there is no intent to be bound.
* *Balfour v. Balfour* rule: domestic arrangements generally are not legally enforceable.
* However, restitution may be granted for extraordinary situation of work which was done by one party for the sole benefit of the other party as in *Pyeatte v. Pyeatte*.

## Restitution and Unjust Enrichment

* Restitution is the prevention of unjust enrichment even when there has been no promise.
* You will not be forced to pay for benefits forced upon you.
* Deposits will be returned less $500 (UCC § 2–718).
* Recovery (R. § 371)
  1. Cost avoided by the defendant, or
  2. Extent of enrichment (disgorgement principle)
* There can be no restitution if all that remains is payment (R. § 373).
* **Quasi contract:** ground for discovering money when the claim is not based on a true contract but redress is available for unjust enrichment.
  1. Test: would the parties have reached an agreement (Cotnam)?
* **Requirements for an implied-in-law contract:**
  1. **Clear benefit**
  2. **Not officious (not forced upon one party)**
  3. **Not gratuitous**
  4. **Benefit is measurable**

**Rule: You may recover for benefits conferred to a party when they are not considered gratuity (i.e. not part of your professional capacity, not excessively out of your way to rescue)**

### Cotnam v. Wisdom, 1907 (p.106)

Facts: Physicians attempted to perform a difficult operation after Harrison was thrown from a streetcar. Doctors sued for services rendered.

Holding: Reversing the lower court, which should not have allowed the decedent’s marital status be considered but they may recover nonetheless.

Rationale: At the time, the means of the patient would be used in determining the amount of recovery. The fictional quasi-contract requires reasonable compensation for services rendered.

**Rule: Quasi-Contractual liability cannot substitute one debtor for another. A prior relationship must exist.** See *Callano,* below.

**Alt. Rule: When you’ve exhausted all options against the original contract party, you can go after others who have been unjustly enriched.** See *Paschall*, p.112.

### Callano v. Oakwood Park Homes Corp., 1966 (p.110)

Facts: Callanos had a contract to sell shrubs to Pendergast, who died. His death cancelled the sale of land, so the land reverted back to Oakwood for ownership. The shrubs had been installed

Holding: Oakwood was not unjustly enriched by the shrubs.

Rationale: There was no expected remuneration to the plaintiff by the defendant. The debt lies with Pendergast’s estate. Quasi-contractual liability cannot substitute one debtor for another.

### Pyeatte v. Pyeatte, 1982 (p.113)

Facts: Wife promised to put her husband through law school without his having to work, after which she would go to graduate school on the same terms. Husband divorced shortly after getting a job at a law firm.

Holding: This was a contract even though it is unenforceable. This rebuts the defense that it was gratuitous.

Rationale: The existence of a contract makes it a good candidate for recovery on grounds of restitution.

## Statute of Frauds

* Requires that certain agreements be in writing in order to be enforceable, including:
  + Performance cannot be completed within one year.
  + Real estate transfer or for a lease greater than one year.
  + Sale of goods above $500.
  + Lease of goods for above $1,000
  + Cosignatories for debt
  + Property to stand as security for an obligation
  + Performance cannot be completed before the end of a lifetime
  + Real Estate Brokers
  + Credit of considerable size
* Rationales: evidence spoliation (witness memory), incentivize reflection before a large agreement is settled.
  + Also called: evidentiary and cautionary rationales.
* As a last resort, promissory estoppel ameliorates the harshness of the statute of frauds.
* Signing a document may be accomplished by any scratch for an individual. Even letterhead would work for a business.
* Must only be signed by the party to be charged (except in 2–201(1))
* Estoppel trumps the UCC and allows enforcement. P.295.
* Almost any writing is good enough for the UCC § 1–201(43).
* UCC § 2-201(1) requires writing for sale of goods above $500. Exception for merchants (confirmation suffices).
  + Unless (§ 2-201(3)) payment has been received, the goods are custom and the seller has begun to procure, or the party being enforced against swears the contract exists.
* UCC § 2-202(2) requires the following to count as notice for 2-201(1):
  + Let ten days go by without responding negatively
  + Recipient had reason to know the contents of the message.
    - This will almost always be true for mailed messages.
  + The message was a writing in confirmation of the contract.
  + An action would not fail under the “sufficient and signed” clause
    - Whether the document would bind the sender if the parties were reversed.
  + Sent within a reasonable time
  + Both sender and recipient are merchants.
    - Defined by UCC § 2-104
* UCC § 2-201(3)–either party can enforce an oral agreement for sale of custom goods once the seller has passed a certain point in procurement.
* **COMMON LAW**
  + R. § 131/132: statute of frauds compliance must be stated with reasonable certainty and may be scattered on multiple writings.
  + R. § 139: statute of frauds may be estopped as necessary to prevent injustice.

### St. Ansgar mills, Inc. v. Streit, 2000 (p.289)

Facts: Defendant never signed a confirmation of order and later refused shipment when he could get corn at a cheaper price at market. It was disputed whether the confirmation was received within a reasonable time after the alleged oral agreement.

Holding: The reasonableness of time under UCC § 2–201 is generally a question of fact for the jury.

Rationale: Reasonableness is a matter of law when there are certain intervening conditions but it should almost always go to the jury. A flexible standard exists.

**Rule: Sometimes estoppel is used in spite of the Statute of Frauds.**

### Monarco v. Lo Greco, 1950 (p.305)

Facts: In an inheritance dispute, plaintiff is suing for partition of the properties which was orally promised to him and encouraged for several years, resulting in reliance by the plaintiff.

Holding: The oral contract is enforceable because plaintiff relied on it and awarding the land to the others would be unjust enrichment.

Rationale: 20 years of labor should be sufficient to result in a legally recognizable forbearance and reliance. If promissory estoppel is the only way to avoid injustice, it can be done regardless of the statute of frauds.

Notes: Reliance still must be foreseeable. Comment to Restatement 139: it may be appropriate to measure relief by the extent of the reliance; not the terms of the promise.

## Moral Consideration

* R. § 86: In general, one may not convert generosity into an enforceable contract claim.
  + Exception for doctors, because you would have been willing to pay for it anyway.

**Rule: Moral Obligation is sufficient consideration only when the promisor has received a material benefit.**

### Mills v. Wyman, 1825 (p.50)

Facts: Seth Wyman promised to pay Mills for the care of his son who was sick. After not paying, Mills brought action.

Holding: Though it is disgraceful, one is not legally bound to pay for a promise which is supported *only by* moral consideration.

Rationale: Consideration other than moral obligation must be included for an enforceable contract.

### Webb v. McGowin, 1935 (p.52)

Facts: Plaintiff sued the estate of McGowin for payment which was promised after he saved McGowin’s life.

Holding: Consideration may be found in the act of saving the defendant’s life.

Rationale: Moral obligation is sufficient consideration when the promisor has received a material benefit. The promise was not gratuitous because there was agreement to pay and acceptance.

## Intent to be Bound

* In the U.S., evidence that there was no intent to enter legal relations does not get you out of it.
  + However, a clear statement of intention NOT to enter legal relations will block enforceability (Restatement § 21).
* Some civil law countries have done away with the doctrine of consideration entirely and allow any writing to serve as consideration.
  + This leaves open the possibility that people will be windled!
* When there is no intent for a contract to be legally enforceable, it generally is not.
  + Freedom to contract/freedom from contract
  + Sometimes it’s just obvious that no contract was intended.
* Letters of intent get around this problem by declaring that there is no legal obligation.
* When the final terms are to be hammered out by lawyers, one of the parties must express an intention not to be bound until a writing is executed, otherwise it is binding upon agreement.
* The English/Continental view is that if the parties say they did not want to be bound, they are not! *Balfour v. Balfour.*
* In commercial contracts, we assume they do intend to enter into legal relations. Pillians and Rose v. Mierop and Hopkins
* Manifestation of intent that a promise shall not affect legal relations means there will not be legal enforcement

# Formation

## Basics

* Offers are revocable at will until they are accepted.
  + Exceptions for promissory estoppel.
* Purpose of contract law is to distinguish the culminating moment from the bargaining activity and to protect that agreement from an effort to start up the bargaining process again.
* Restatement § 17 requires a “manifestation of mutual assent.”
* An option contract is an irrevocable offer, within the time stated.
  + You’ll have to pay for this!
* Restatement § 45: an option contract is created by the beginning of a performance of a unilateral contract.
  + Offeror’s performance is condition upon completion of the offeree’s performance
* Firm offer is somewhere in between. It is a signed righting which is not revocable for lack of consideration during the time stated.
  + It’s an offer plus a promise not to revoke.
  + It holds the offer open
  + There is an implied promise not to revoke the offer
* UCC § 2-205 Firm Offers
  + Firm offer may not exceed three months.

## Precontractual Liability

* Substantial reliance by a general contractor on a subcontractor results in an implicit promise not to revoke. R. § 87(2).
* Agreements to agree (Tribune II) are not binding but an agreement to negotiate in good faith is. *Channel Home Centers*.
* Tribune I: agreements that haven’t been written down yet.

### Baird v. Gimbel, 1993, 64 F.2d 344

Facts: Defendant merchant sent a mistaken offer to contractors. Plaintiff contractor received the offer and sent in a bid for a job based on the prices quotes, accepting the D’s offer later only after P withdrew it.

Holding: The defendant had withdrawn his offer before it was accepted, so there was no contract.

Rationale: In this case there is no bargain, so we can’t use promissory estoppel. An offer is not a promise.

### Drennan v. Star Paving, 1958

Facts: General contractor brought action against a subcontractor after relying on his bid and defendant’s refusal to perform at the lower price.

Holding: Reasonable reliance resulting in a foreseeable prejudicial change in position affords a good reason for implying a subsidiary promise not to revoke an offer for a bilateral contract.

Rationale: The absence of consideration is not fatal; the plaintiff justifiably relied on the defendant’s offer. This is not a case of detrimental reliance on an offer (which would not stand). General must be able to rely on sub’s bid to submit his own.

Promissory estoppel converts a revocable offer into an option contract in this case.

**Rule: Offer to do work includes a subsidiary promise not to revoke until the offerree has a chance to accept after the general contract gets awarded.**

* Restatement § 87(2) says that when there is an implicit promise, apply P.E.
* We’re really saying that the subcontractor is willing to be bound by submitting an offer.
* Restatement § 87(1) is a purely formal device requiring a recitation of purported consideration.
* Doesn’t go the other way around. Subcontractors do not rely on general contractors so they cannot force acceptance. (Holman Erection Co. v. Orville E. Madsen & Sons, Inc. 330 N.W.2d 693 (Minn. 1983).

**Liability through Promissory Estoppel**

### Hoffman v. Red Owl Stores, 1965 (p.230)

Facts: Plaintiff sold his bakery and bought and sold a grocery store and bought land in reliance on statements from Defendant that they would allow him to open one of their franchises.

Holding: Plaintiff is entitled to damages for some losses.

Rationale: The promise that $18,000 would be enough is a promise to not deny the franchise on the basis of money. There must be an actual promise to get to Promissory Estoppel.

It was inappropriate to award lost profits because he wasn’t in the grocery business for the long run, he was just trying to learn more about the business.

* Reliance on the opportunity to perform also applied for a case of an employee who was offered a position pending background checks. P. 233
* Expectation damages would not have made any sense in this case because he was never offered a franchise.

### Cyberchron Corp. v. Calldata Systems Development, Inc., 1995 (p.234)

Facts: Cyberchron produced some equipment but never delivered to Calldata or Grumman an no payment was ever made to Cyberchron. There was a dispute about the maximum weight of the equipment.

Holding: This is a case of promissory estoppel because it meets the three requirements (a clear promise, reasonable/foreseeable reliance, unconscionable injury). Damages must be concrete.

Rationale: Promissory Estoppel is used because Cyberchron did not want to enforce the “good faith promise to negotiate.” They wanted the final sale of goods promise. Expectation damages are impossible because we don’t know whether they could have fulfilled the good-faith promise.

* American law has no obligation to negotiate in good faith (civil law countries do)—“freedom from contract.”
* However, parties may expressly agree to require good faith negotiations.

### Channel Home Centers v. Grossman, 1986 (p.239)

Facts: Property owner gave a letter of intent to a prospective tenant to negotiate in good faith and to withdraw the premises from the marketplace.

Holding: The letter of intent binds the property owner for a reasonable period of time when the tenant has expended significant sums in connections with preparation for the lease.

Rationale: Forcing good-faith negotiation is almost impossible because the parties are already annoyed with each other and it would require supervision. The letter had value to both parties, so it has sufficient consideration.

Notes: We don’t know if the parties would have come to an agreement even if they had negotiated in good faith.

## Assent

* Commonly falls into two categories: objective (based on actions) and subjective (based on intent).
* Contracts law generally follows objective meaning.
* R. § 18 requires a mutual manifestation of intent.
* When words have only one meaning, assent is the expression of those words.
  + There is an exception for a time when the other party *knows* the subjective, unreasonable meaning of the words as well.
    - Example: if Lucy knew Zehmer was joking, there would be no assent.
  + We put the burden on the person best able to prevent the mistake: if you don’t prevent it, you will be saddled with the consequences.
* For misunderstanding, see Restatement § 20
  + If the other knows of your strange meaning, that’s what counts.
  + Only if you know of no other meaning that could be attached.
* Example: Pepsi Harrier Jet.
  + This was obviously absurd and meant to be zany humor, especially considering the ridiculously low price.
* In the *Peerless* case, there was no meeting of the minds because both parties meant different things. Neither party had reason to know of the other’s intention.

### Lucy v. Zehmer, 1954 (p.117)

**Rule: When the words have but one meaning, assent is judged by their expression.**

Facts: Zehmer’s sold land to Lucy but Zehmer made the offer in jest, intended as a dare.

Holding: The mental state of the parties is not relevant; specific performance must be granted to the plaintiff.

Rationale: Contracts law looks to the outward expression of a person, not the subjective mindset.

## Misunderstanding

* R. § 20: there is no mutual manifestation of intent if:
  + Neither party knows the other’s meaning
  + Both parties know the meaning attached by the other.

### Frigaliment Importinv v. BNS International Sales Corp, 1960 (p.401)

Facts: “What is chicken?” Plaintiff says it’s only young chicken, Defendant says it’s any bird of that genus.

Holding: Plaintiff has not sustained its burden of persuasion that the contract used the narrower sense of “chicken.”

Rationale: Plaintiff must prove that Plaintiff meant narrow and that either (1) D meant narrow too or (2) D understood that P meant narrow or had reason to understand that P meant narrow.

* Defendant’s subjective intent coincided with the objective meaning so there is no reason to believe that the contract was for something else unless it is proven by the plaintiff.

### Hurst v. W.J. Lake & Co., 1932 (p.407)

Facts: Horse meat contract which specified that if any scraps analyze at less than 50% protein there would be a discount. Defendant argued that 50% meant 45%

Holding: Evidence of trade custom is important in determining the meaning of a contract.

Rationale: None of the rationale in favor of a “judicial sieve” is appealing.

Rule: Trade usage matters.

### **Objective understanding**

### Raffles v. Wichelhaus, 1864 British Case (p.422)

Facts: Plaintiff would sell 125 bales of cotton from the ship Peerless from Bombay. Defendants thought it was a different ship and refused to accept the said goods.

Holding: It is immaterial what the subjective understanding was; there is no objective meaning to *Peerless* because it’s a name.

Rationale: The time of sailing is no part of the contract. When there is a “latent ambiguity” there is no meeting of the minds.

### Oswald v. Allen, 1969 (p.424)

Facts: Dr. Oswald arranged to buy “all of her Swiss coins.” She thought he just meant her “Swiss Coin Collection.”

Holding: When the terms used are ambivalent, and the parties understood them in different ways, there is no contract unless one was aware of the other’s misunderstanding.

Rationale: That’s the only way to get a “meeting of the minds.”

## Parol Evidence Rule

* Regards the effect of a later written document on a prior oral understanding that was reached.
* Operation: precludes any proof that the terms of the contract are other than as expressed in the writing.
* R. § 255.
* One of the purposes is that it doesn’t force parties to trust untrained juries.
* Parol evidence is substantive so the state’s law applies in federal court.
* Rule requires:
  + Writing
  + Complete Integration under R. § 209
  + Can’t Plead Prior Agreements
* If a prior agreement is sufficiently different from the one in question, it is treated as *collateral* and therefore still in force.
  + If it falls within the scope of the contemporaneous written agreement, it is no collateral (*Gianni*).
  + Other test for collateral: would not naturally be made separately from the written document.
* UCC § 2–202: Parol Evidence Rule for sale of goods.
* New York: Plain Meaning rule: court must first determine whether there is ambiguity in the writing before allowing evidence of what the parties meant.
* All states allow evidence of trade usage if that would affect the determination of whether the words are ambiguous.

### Gianni v. R. Russell & Co., 1924 (p.368)

Facts: Plaintiff was a tenant and had exclusive rights to sell tobacco through an oral contract made after the lease was signed. Landlord let space to another tenant and allowed him to sell tobacco.

Holding: The plaintiff’s evidence of an oral contract is inadmissible as parol evidence; the written document is all that matters.

Rationale: Verbal agreements are merged into the written document. The court can infer that it would have been natural to include the promise of exclusive rights into the writing.

### Masterson v. Sine, 1968 (p.371)

Facts: Masterson sold land to Sine, reserving an option to buy it back before a certain date. Dallas Masterson’s estate went bankrupt and his wife is attempting to enforce the option. Question of consideration depended upon extrinsic evidence.

Holding: Extrinsic evidence should be excluded only when it will mislead the fact finder.

Rationale: It is possible that they may have just left this out of the deal. This is the **new CA rule for Parol Evidence: a document cannot prove its own completeness.**

Dissent: There is a statute in California which specifically says that options are assignable. Parol evidence should not be able to rebut this legal presumption.

Notes: The question is always whether there was a complete integration. The old method (NY rule) was to look at the face of the instrument. CA rule is that an instrument cannot prove its own completeness.

* Merger clauses can be added to a contract which state that there are no promises other than the ones in the document. P.376
  + Does not automatically mean the document is completely integrated.
* Requirements for parol evidence to be admitted in CA (p.377):
  + Must be a collateral agreement in form
  + Must not contradict express or implied provisions of the written document
  + Must be one that would not ordinarily be expected in the writing.
* No-oral-modification clauses are generally not effective under Common Law but is under UCC (p.380):
  + UCC § 2-209 states that an agreements with no-oral-modification clauses cannot be modified orally.

### Bollinger v. central PA Quarry, 1967 (p.377)

Facts: Bollingers contracted to allow the defendant to deposit construction waste on their property. Π alleges a prior oral agreement to put it under the topsoil.

Holding: For the plaintiff—the proffered evidence was not materially critical and would not have changed

Rationale: None of the rationale in favor of a “judicial sieve” is appealing.

**Rule: If the defendant’s actions informed the plaintiff’s understanding, the contract can be modified with parol evidence.**

**Notes: Evidence may be admitted to show that the written agreement is not valid (Restatement 214). Evidence to show fraud in the inducement of a contract is allowed.**

## Extrinsic Evidence to Show Parties’ Intent

* Hierarchy: plain meaning, objective evidence, trade usage, asymmetry in party knowledge, subjective evidence.
  + Objective evidence: *Frigaliment*
  + Trade Usage: *Hurst v. W. J Lake & Co.*
  + Asymmetry: if offerree knows of error, the offeror is not bound.
* If there is no consensus, there is no contract (*Raffles*).
* Traditionally, use the *Plain Meaning Rule.* First, presume that if the document appears to be completely integrated, treat it as such. Then, if there is ambiguity:
  + Only used if the meaning is ambiguous.
    - NY and CA disagree about which evidence determines ambiguity.
  + If ambiguous, extrinsic evidence may be allowed.
* New York Rule: document must be ambiguous on its face in order to allow extrinsic evidence.
  + Gives people the right incentive to be clear in the first instance.
  + Predictable outcomes.
* California Rule: extrinsic evidence gives context to the meaning of the words; if a judge determines that it is relevant, extrinsic evidence may go to the jury.
  + Encourages fraud if things don’t go your way.
  + It is inaccurate: most likely, the parties meant what they said.

### Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co., 1968 (p.382)

Facts: Π suing for damages during work performed. Δ had agreed to indemnify plaintiff and work at its own risk. Δ claims agreement was to cover injury to third parties only, not Π’s property.

Holding: The court should admit extrinsic evidence.

Rationale: Judges are very biased in apply the definition of a word. Words only have meaning in context. Excluding the parol evidence could apply a meaning entirely different from the parties’ intent.

**CA Rule: Extrinsic evidence may be admitted to determine whether a given term is ambiguous. Judge must determine that it is relevant first.**

**Note:** This allows the judge to get a preliminary assessment about the plausibility of the claim in light of the evidence before it goes to the jury. We don’t trust judges to determine whether a meaning is appropriate but we do trust them to determine which evidence is relevant?

### Delta Dynamics v. Arioto

Facts: Controversy over whether the damages set forth in the contract are the only remedy or the minimum.

Holding: Extrinsic evidence to show the meaning of the clause should be admitted.

Rationale: Nothing in the rest of the contract precludes either interpretation, so the jury should make a decision about.

Note: This is a crazy outcome; it says you can terminate, nothing more!

### Greenfield v. Philles Records, Inc., 2002 (p.386)

Facts: Ronnie Greenfield allege that the 1987 agreement with Δ did not provide Philles with the rights to license the music to others. It was a contract without attorneys.

Holding: Contract’s silence on synchronization and licensing does not create ambiguity. No extrinsic evidence.

Rationale: Courts cannot alter contracts to reflect personal intentions of fairness; extrinsic evidence should only serve to help clear up an already-existing ambiguity.

**NY Rule: The contract must be ambiguous on its terms in order to use extrinsic evidence.**

### WWW Associates, Inc. v. Giancontieri, 1990 (p.390)

Facts: Provision of a contract allowing for reciprocal cancellation in a real estate deal is unambiguous. Should it be read in light of extrinsic evidence?

Holding: No, the document must be internally ambiguous.

Rationale: Ambiguity should not be created out of extrinsic evidence.

**NY Rule: Extrinsic evidence should not be used to create ambiguity.**

### Trident Center v. C.T. Gen. Life Ins. Co., 1988 (p.392)

Facts: Loan agreement which offers repayment at specified terms says that π may not prepay the principal in whole or in part for the first 12 years. Π wanted to pay off early.

Holding: Though the language in the contract is abundantly clear, the California Rule requires that extrinsic evidence must be admitted.

Rationale: Though it undermines the basic principle that language has meaning, the California rule mandates that extrinsic evidence must be admitted.

### Rules of Interpretation (p.398-401)

* These are used to interpret statutes but there is an obvious similarity.
* Purpose Interpretation—recite the surrounding circumstances
  + Examine the law before enactment of the statute
  + Ascertain the “mischief or defect” for which the law did not provide.
  + Analyze the remedy offered
  + Determine the true reason of the remedy
  + Apply the statute to suppress the mischief
* Public Interest
  + Contracts in violation of some strongly rooted public interest (especially a statute) are unenforceable.
* Maxims
  + *Ejusdem generis* (of the same kind)
  + *Expresio unius est exclusion alterius* (the expression of one thing is the exclusion of another)
  + *Noscitur a sociis* (it is known from associates)
* Contract-specific maxims
  + *Contra proferentum* (against its author/proferror)
    - Last resort… serves to make men watchful of their behavior.
    - We can reasonably assume lawyers are capable of using language clearly and to their benefit.

## Offer

* **Corbin definition:** Offer is an act whereby one confers upon another the power to create contractual relations between them. The offerree must reasonably believe he has that power.
  + In an offer, all that is left is acceptance (Restatement § 24)
* Go to UCC § 2-204 for formation. Not everything must be in the offer.
* Court can supply terms that were left out, such as § 2-311, which states the buyer has the option with regard to assortment of goods.
* To determine whether an offer exists, we look at “manifestations”
* In New York, you won’t get to the subjective meaning unless the writing itself is ambiguous (like the Parol Evidence rule)
  + We’re not as worried about getting it right as we are making everyone’s lives easier in the long run.
* An offer can only be accepted by the person the offeror has invited to furnish the consideration. P.130.
* Offers can be revoked at any time prior to acceptance.
  + May be direct, as in *Dickinson v. Dodds*. Restatement § 43.
* Advertisements: general rule is that they are quotations, or invitations for the buyer to make an offer (Lefkowitz is an exception—nothing is left for negotiation and creates a contract upon acceptance by performance).
  + Consumer protection laws will allow for recovery in cases of misleading advertisements
* A quotation is not an offer; it is an invitation to negotiate.
* A party may invite open bids at auction. This is not an offer to accept the best bid. P. 136
  + This is codified in UCC § 2-328.
* Construction projects often begin with bidding.
* Mistaken bids occur frequently due to the late time that subcontractor bids are submitted.

### Owen v. Tunison, 1932 (p.127)

Facts: Π writes asking whether Δ will accept $6,00 for his land. Δ says that “it would not be possible to sell unless” he got $16,000 for it. Plaintiff responds to try to accept the offer. Defendant says he doesn’t want to sell.

Holding: Defendant’s letter about $16,000 was not an offer. No contract.

Rationale: There was no meeting of the minds involving an offer/proposal. The defendant’s language is general and does not bind him.

**Rule: There must be an actual offer.**

Notes: If he said “I will take $16,000,” that would count as an offer. It is unclear what he was trying to say.

### Harvey v. Facey, 1893 (p.129)

Facts: Π asks what the lowest price would be for a property. Δ responds that the lowest price would be L.900 and Π accepts. Defendant claims no contract existed.

Holding: There was no contract! The telegram was not binding in any respect; it left everything open and cannot be treated as an offer.

Rationale: The price did not indicate whether there was a willingness to sell. If we call this an offer, nobody would ever discuss price. In restatement terms: there is no manifestation of willingness to enter into a bargain.

**Rule: A possible sales price is not an offer (exception: fairmount case below).**

### Fairmount Glass Works v. Crunden-Martin Woodenware Co., 1899 (p.130)

Facts: Π (Crunden) requests a quotation. Δ sends a price “for immediate acceptance.” Π accepts the offer. Δ states that it is impossible to fill the order.

Holding: The letter stating the price quotations was not a mere quotation. It constituted an offer.

Rationale: This was not a mere quotation. “For immediate acceptance” doesn’t make sense in any way but as a manifestation of an intention to make an offer. It implies that the next step will be acceptance.

**Rule: The order is the offer, not the price quotation. But when there is precise language, details and a clause like “for immediate acceptance,” it is an offer.**

Note: The specifications of the order will be left to the discretion of the buyer when it is not said anywhere. Court reads that into the contract. See UCC §2-311 for that.

### Lefkowitz v. Great Minneapolis Surplus Store, 1957 (p.134)

Facts: Π was first in line to buy a stole for $1 (worth $139.50). Δ refused to sell, saying it was intended only for women.

Holding: The advertisement was not an offer.

**Test for the existence of an offer: Do the facts show that some performance was promised in exchange for something requested?**

### Elsinore Union Elementary School Dist. v. Kastorff, 1960 (p.139)

Facts: Kastorff made an honest clerical error in submitting a bid to the school district. Board of Ed. asked if he was sure and he said he was. The next morning he realized his error and immediately called the superintendent. Board voted to accept his offer again.

Holding: For the defendant—this was an honest clerical mistake.

Rationale: An honest mistake, without negligence, when followed by prompt notice, can be voided. We don’t allow someone to accept a bid they know is in error.

Notes: In this case, the bid was irrevocable due to statute.

## Definiteness

* Restatement § 33 requires that contract terms be reasonably certain.
  + Test: does it allow the court to fashion a suitable remedy?
* UCC § 2-204(3) states that even though terms are left open, the contract does not fail for indefiniteness.
* Definiteness speaks to whether a court can provide a remedy.
* All contracts are somewhat incomplete
  + Law & Economics: parties are assumed to be best able to allocate risks. Contract rules serve as common risk allocations that can be varied by individual agreements.
* If a party performs in an agreement which is found to be unenforceable do to indefiniteness, they are entitled to restitution.
* Is it definite enough to provide an agreement in the first place?
  + Question of fact as to whether the parties manifested intent.
* Can an indefinite agreement be enforced?
  + Only if the court can supply terms to fill the gaps, as reasonable in the circumstances.
* Flexible Pricing
  + When price is left open, UCC § 2-305 supplies that a reasonable price should be used.
  + Parties may sometimes create a default pricing formula, accounting for the contingency that negotiations fail.

### Toys, Inc. v. F.M. Burlington Co., 1990 (p.249)

Facts: Lease gave Π a five year lease with an option to renew for five more. No agreement is reached for renewal and Toys left and sued for breach of contract. Controversy was over “prevailing rate within the mall” clause of the option.

Holding: The clause is sufficiently definite.

Rationale: Though it’s hard to know what the prevailing rate is for real estate, that doesn’t matter. Both parties *agreed* to be okay with the prevailing rate within the mall.

**Rule: Option contract can be binding if the provisions are sufficient to reach agreement.**

### Oglebay Norton Co. v. Armco, Inc., 1990 (p.252)

Facts: Companies had, for years, used the published price in a magazine to determine shipping rates. The magazine was no longer published and the disputed what the price should be.

Holding: Court takes into account changing market circumstances and the previous prices used by the parties to set a reasonable price.

Rationale: Court also orders specific performance: good-faith negotiation. Definiteness is not an issue because the parties will have to negotiate on their own.

## Acceptance

* Acceptance is the voluntary act which exercises the power conferred by the offer to create a contract.
* R. § 60: offeror is master of the offer and can dictate the form of acceptance.
* If no means of acceptance is specified, it can be accepted by a reasonable means. R. § 30(2), *White v. Corlies & Tift*.
* The offer may not be changed after acceptance.
* Means of acceptance depends on the offer (return promise or performance).
  + Acceptance by promise requires notice. R. § 56.
  + Acceptance by performance does not unless called for in the offer. R. § 54(1), §53
* Silence is generally not effective as acceptance.
  + In some cases of recurring business transactions, silence plus retention of the goods can be acceptance.
  + See Restatement § 69. EXCEPTIONS:
    - If you use the goods with the ability to reject them.
    - Offeror states that silence is acceptable. And Offeree INTENDS TO ACCEPT.
    - Prior course of business
* Existence of a contract is a matter of great policy importance (applies as far as things including anti-discrimination law p.156).
* Bilateral promises invite acceptance by a promise. The return promise must be communicated to the offeror in a “reasonable time.”
  + Acceptance by return promise requires a manifestation of intent to be bound. R. § 21.
* Unilateral promises sometimes require no notice of acceptance; just performance.
  + Carbolic Smoke Ball—plaintiff performed as ad mentioned but still got influenza so she should get the reward! (p.157)
  + Old view: Unilateral offers are revocable until completion of performance
  + Commencement of performance is like an option contract under § 45 of Restatement.
  + Under R. § 19, conduct can count as a manifestation of mutual assent.
  + If you learn about the offer halfway through and keep performing, acceptance is met. R. § 51.
* UCC § 2–206 governs acceptance.
* UCC § 2–207: acceptance must be definite and seasonable.
* Offers remain open for a reasonable time. *Ever-Tite*.
* Acceptance by shipment is allowed under UCC § 2-206(1)(b)
  + But shipment of non-conforming goods is not acceptance if they are only shipped as an accommodation to the buyer
* Power of acceptance can be terminated by:
  + Lapse of an offer
    - If no period is specified, offers lapse in a reasonable time. R. § 41, UCC § 2–206(2).
    - Reasonable time will be shorter when there are greater market fluctuations.
    - Face-to-face offers are only open until the close of conversation.
  + Revocation by the offeror
    - Offers are generally freely revocable R. § 42.
    - Indirect knowledge of revocation is enough. R. § 43.
  + Offeror’s death or incapacity R. § 48.
  + Offerree’s rejection
* Option contracts may be created by:
  + Consideration
    - Requires a nominal sum.
  + Firm offers under the UCC
    - No consideration required. See UCC § 2-205, which states that for a merchant selling goods with signed writing, the firm offer can last no longer than three months.
  + Reliance by the offerree
* Option contracts must meet formation. R. § 25.
* Option contract does not expire when the main offer is rejected. R. § 37.
* At common law, firm offers are freely revocable. *Dickinson v. Dodds*.

### International Filter Co. v. Conroe Gin, Ice & light Co., 1925 (p.147)

Facts: Proposal was made, subject to corporate approval. Then “accepted” letter was the offer. Then “OK” was sent back from corporate, indicating acceptance.

Holding: Corporate approval indicated acceptance.

Rationale: Defendant had dispensed with notice and allowed the contract to take effect without notice.

### White v. Corlies & Tift, 1871 (p.152)

Facts: Π left an estimate with the Δ. Δ changed specifications and sent them to Π. Δ says upon agreement, you can begin at once. No reply but the Π started purchasing lumber, etc.

Holding: The Δ must know the offer was accepted; acceptance happens by an action.

Rationale: Any physical act will do, including the dropping of a letter into the mailbox. **The defendant must be told of acceptance, somehow.**

Note: The offeror is at risk for a few days here!

### Ever-Tite Roofing Corp. v. Green, 1955 (p.154)

Facts: Greens signed a document that set out the work of the roofing, pending written acceptance by corporate (and this was pending a credit report). Upon completion of the credit report, Ever-Tite loaded trucks and sent employees to find that Greens contracted with another company.

Holding: **Acceptance can be performed or promised.**

Rationale: This was timely notice because the defendants should have expected that the credit check would take a few days.

Note: The court is concerned about leaving the offer open for too long.

### Allied Steel Conveyors, Inc. v. Ford Motor Co.

Facts: Allied contracts to do a repair in Ford’s plant and contract is not binding until accepted. The final version including indemnity was not accepted until after the injury.

Holding: The offer was accepted by performance.

Rationale: How do we know when an offer may be accepted by performance? If the offeror defines it that way or if the suggested methods don’t preclude performance. Since the real object here was to get the work done, signing the paper was not essential.

### Corinthian Pharmaceutical systems, inc. v. Lederle Laboratories, 1989 (p.161)

Facts: Π frequently bought from Δ. Δ raised prices. Π ordered lots of vials right before price increase and then sent written confirmation. Δ confirms the lower price for 50/1,000 vials.

Holding: For the defendant. There was never acceptance of the offer at the low price.

Rationale: None of the rationale in favor of a “judicial sieve” is appealing. Shipment of the 50 at a lower price is not acceptance of the others (UCC 2-206(1)(b)).

### Dickinson v. Dodds, 1876 (p.171)

Facts: Δ agrees to “hold open” a land sale until Friday at 9 AM. Π gives document to mother-in-law but she doesn’t pass it on. Π gets it to him on Friday morning at 7 but Δ had sold the property to someone else.

Holding: There was no binding contract; Δ was free to sell the land to whomever he chose.

Rationale: Agreeing to sell is an offer, not an agreement in itself. There would be no consideration for such a contract.

**Rule: There is no communication necessary to revoke an offer. A promise to hold open an offer is not enough to create an option contract.**

## Filling Gaps and Contracts of Adhesion

* The incompleteness of contracts is inevitable.
* In filling gaps, a court supplies a contract term in order to deal with a dispute.
  + If the court is persuaded that the parties had a common expectation. (Bentham: what the parties *would have done*)
  + Implement “fair and reasonable” term.
* Statutory Gap-Filling
  + UCC has default definitions in Article 2.
  + UCC § 1–303 has basics.
  + UCC § 2–305: price term gap-filler.
  + UCC § 2–308: delivery shall be to the seller’s place of business or residence unless the goods are in some other place.
  + UCC § 2–310: payment is due when buyer receives the goods
* Keep in mind that parties can contract around the UCC.
* Implied Warranties
  + UCC § 2–314: Courts may apply a default term for the quality of performance based on the notion of an “implied warranty.”
  + UCC § 2–315: warranty based on a particular purpose.
  + UCC § 2–316: how to get out of implied warranties
    - Sale “as is” or with very conspicuous terms stating.
* Today, most contracts aren’t individualized like they were under the common law (one party has advantages like experience, certainty, planning, calculable risks).
* One is generally bound to a contract she has signed.
* Inconspicuous terms may result in a finding of lack of assent.
* Signs of a contract of adhesion:
  + Economic power is dictating its terms to a weaker party
  + There is no opportunity to bargain
  + There is no time for expert advice.
* R. § 211: Adhesive contracts apply regardless of whether they were read if they are not fraudulent or unfair:
  + Contradicts expectations
  + Unconscionable
* A predominant unilateral will dictates law to an undetermined multitude.
* When the contract term is conspicuous (there is adequate notice), contracts of adhesion may be upheld.
* Bad typography can result in unenforceability
  + UCC § 2-316(2) requires that a reasonable person would notice it.
* Businessmen are held to a higher standard because they should know better.
* Forum selection clauses are enforceable. *Carnival Cruise Lines*.

### Henningsen v. Bloomfield Motors, Inc., 1960 (p.445)

Facts: Plaintiff sues for breach of implied warranty after new car fails. Provision in fine print limits liability and contained a merger clause.

Holding: When there is no opportunity for a bargain, the provisions of an adhesion contract cannot be enforceable when it would be inequitable to enforce.

Rationale: There should be a freedom from contract. When all car companies do this, consumers have no choice and that is contrary to a free market. One party is subjecting its terms onto multiple other parties.

Notes: UCC § 2-719 says that when the exclusive remedy fails its essential purpose, a UCC remedy may replace it.

### Graham v. Scissor-tail

Facts: Grham, an experienced music promoter, enters into a contract which required binding arbitration.

Holding: This plaintiff should reasonably have expected what appeared in the terms of the contract.

**Test for adhesion contracts:**

**The terms must be within the reasonable expectations of the party and must not be unduly oppressive.**

### Doe v. Great Expectations, 2005 (p.489)

Facts: Dating website didn’t result in dates, in violation of NYS Dating Services Law.

Holding: The contracts are unenforceable and the entire costs should be refunded.

Rationale: Statutory limit of $25 on dating services which do not furnish a given number of referrals. These contracts violated every mandate of the NYS statute.

## Implied Warranties

* UCC § 2–314: we imply a warranty of merchantability if a seller is a merchant under § 2–104.
  + The standards in subsection (2) are below perfection.
* UCC § 2–315: we imply a warranty when the seller has a reason to know of the buyer’s specific purpose and the buyer relies on the seller’s judgment.
  + Use this section when the buyer intends to use the product for a nonstandard use.
* UCC § 2–316(2): exclusion of warranty must mention merchantability, be conspicuous, and be in writing.
* UCC § 2–316(3): exclusion of a warranty for “as is” items is allowed when the buyer can examine the item and trade custom permits.
* At common law, in a *caveat emptor* state, one must contract for a warranty if she wants it.
* Common law/statutes have limited when sellers can exclude implied warranties, as in *Henningsen v. Bloomfield Motors, Inc.*
  + There was no competition in the area of express warranty and the buyer has no room for negotiation.

## Battle of the Forms

* Mirror image rule under the common law: the contract accepted must be exactly the same as the contract which was offered
  + Counteroffer is rejection
  + Under this rule, the last shot fired before performance ends up being the binding contract.
* However, the power to accept under an option contract is not lost by rejecting the offer itself. Restatement § 37.
* In general, one is bound to terms on a form one has signed.
* UCC § 2-207: abandonment of the mirror-image rule
  + Counteroffer is not rejection; it as acceptance of some terms.
  + Changed terms are considered proposals unless they materially alter it.
    - They are automatically included unless notice of objection has already been given or is given within reasonable time.
  + Changes may also be accepted by performance.
* Differing terms under § 2–207. Three methods:
  + Majority rule: different terms are knocked out.
  + Posner: treat as if different is additional; keep the offeror’s language.
  + Goldberg: fairness.
* This shifts the advantage back to the offeror, ending the last-shot-fired rule.
* Not all responses to an offer are acceptances—acceptance must be definite and express.
* “Materially alter” under § 2-207(b)
  + Differs from state to state.
  + One test is surprise (p.199). “Material if consent cannot be presumed.”

### Dorton v. Collins & Aikman Corp., 1972 (p.193)

Facts: Dorton took delivery as usual and accepted it; they later learned about the type of the material and were dissatisfied.

Holding: Carpet Mart accepted through performance.

Rationale: UCC § 2-207 allows for acceptance by performance.

Notes: If it is stipulated that a buyer must assent, it will not be binding until he does. In this case, the offer was not conditional and it was accepted by performance.

### Itoh & Co. v. Jordan Int’l Co., 1977 (p. 199)

Facts: Battle of the forms and seller’s acceptance was conditional on buyer’s assent to additional terms, including arbitration clause.

Holding: Since the arbitration clause was not “supplemental” or “missing,” and would not get automatically filled by a gap-filler provision, there is no such term in the contract created.

Rationale: The seller elected to include this in his standard form, so it is not unfair to do this to him.

### Northrop Corp. v. Litronic Industries, 1994 (p.202)

Facts: Northrop printed wire boards and refused to accept them, arguing the 90 day warranty had passed. Which contract is brought into being?

Holding: Acceptance is effective even though it contains different terms. The discrepant terms drop out and are filled with gapfillers.

Rationale: This is the majority view. The acceptor didn’t really accede to the terms. But perhaps those terms were just the product of a thoughtless boilerplate?

### ProCD v. Zeidenberg, 1996 (p.211)

Facts: Defendant purchased plaintiff’s software which came with a restrictive license limiting it to noncommercial purposes and then used it for a commercial purpose.

Holding: Buyer accepts goods when he fails to make an effective rejection. He could have returned the package.

Rationale: ProCD proposed a contract that the buyer would accept by using the software after having the opportunity to read it at his leisure. Since he failed to reject it, he accepted the contract.

Package must provide notice on the outside. Acceptance begins at time of license acceptance; not purchase.

Notes: It seems to say that you are guaranteed a right to return this product. You must also have an opportunity to read before you assent (notice on the outside of the box, perhaps)

### Hill v. Gateway 2000, Inc., 1997 (p.215)

Facts: Plaintiffs represent a class of Gateway computer buyers who opened their computer and used it for more than 30 days only to find out that the terms inside the box limited the warranty to 30 days. They accepted to an arbitration clause.

Holding: By keeping the computer beyond 30 days, the Hills took advantage of Gateway’s offer.

Rationale: Offeror may invite acceptance by any conduct. Customers are best off getting the terms in writing anyway

Note: There was no express notice: it was implicit through common trade practices that it would be in the box.

# Remedies

Contract law is primarily concerned with *relief* (compensation), not *punishment*.

## General Remedies

### U.S. Naval Inst. v. Charter Comm., Inc., 1991 (p.9)

Facts: U.S.N.I was the assignee to the rights of *The Hunt for Red October* and as such entered into an agreement with Berkeley to publish the paperback edition, not to be sold before Sept. 1985. They sold too early.

Holding: Damages owed for breach of contracts in the amount of $35,380.50 upheld but the lost profits of $7,760.12 were reversed.

Rationale: The $35,380.50 figure assumes the same amount of hardcovers would be sold in September as in August, which is appropriate. There is no information about what the paperback sales would be, so no lost profits can be awarded.

* **Expectation damages:** attempt to put the promisee “in as good a position as he would have been in had the contract been performed.”
  + One way to get this is specific performance. (only used when other remedies are inadequate)
  + In the U.S., in most cases an award of compensatory damages for the breach will be used almost always.
* Historically, equitable relief was only available only when remedy at law was inadequate
* **Reliance damages:** compensation for detrimental action taken on the reliance of a promise.
* **Restitution damages:** restore the promisor to the position he would have been in had the promise not been made.
  + Must be given without regard to the future profitability (or lack thereof) of the contract. See p.19-20, case of U.S. contract with offshore drillers.
  + Go with whatever is more generous to the nonbreaching party: cost avoided or value of benefit conveyed.
* Every victim of breach of contract is eligible for some damages ($1), “for reasons we do not understand.” –Judge Posner (p.26)
* Court costs are generally not recoverable in the U.S. p.27
  + However, there are mechanisms for allowing consumers to go forward with claims anyway (attorneys’ fees, higher damages, etc.) p.27
* Pareto criterion: rules should attempt to make nobody worse off and at least one person better off. (impractical in real life)
* Kalder-Hicks criterion: the benefits should outweigh the losses. Leave the gainers better off while minimizing the losses (heading toward a Pareto improvement)
* Legal rules affect payoff so they affect peoples’ choice. Law incentivizes certain behavior.
* Efficient breach—purely distributional
  + When the cost of breach is less than the benefit of breach.
* Coase Theorem: in the absence of transaction costs, parties will bargain to an allocatively efficient outcome under any remedy.
  + Rule: we must look at the transaction costs and ask about the desirability of a given remedy in that

### Sullivan v. O’Connor, 1973 (p.14)

Facts: Π paid $622.65 to Δ for plastic surgery which was supposed to require two operations. After three, she was still disfigured and could not be improved. Π was an entertainer and wanted to recover lost profits.

Holding: Compensatory damages are appropriate for failure to perform the surgery only.

Rationale: Breach of contract appropriate because he made promises of a specific outcome. Pain and suffering for the third operation are appropriate.

## Expectation Damages

* Expectation damages are the usual remedy for breach of contract.
* Goal is to put the promisee in the position he would have been in had the promise been performed (made whole)
* Depends entirely on the particular promisee, not the reasonable promisee
* Restatement § 347 includes three broad factors:
  + Loss in value
    - When the breach has eliminated the expected return of the performance itself.
  + Any other loss
    - Phsyical harm to person or property
    - Expenses incurred in an attempt to salvage the transaction after breach
  + Any cost avoided
    - Beneficial effect of breach
* UCC § 2–706 is for seller’s resale
  + Seller can recover the difference between resale and contract price plus incidental expenses less expenses saved
* If the seller does not resell, he can recover under §2–708
  + Seller can recover difference between market price and unpaid contract price plus incidental damages less expenses saved
* Buyer’s cover UCC §2–712
  + The buyer may cover after breach, recovering the difference between cover and the contract
  + Effect of this: plaintiff will only have to refer to the contract price when no resale was made (but consequential damages will be denied if there was no cover)
* Buyer’s incidental damages under § 2–715
  + Seller does not get incidental damages because the buyer *needed that thing to do something* and would lose profit by not having it.
* In losing contracts (p.625), we put the loss on the party whose wrong has brought up the case in the first place.
  + First rule: look into plaintiff’s actual expectancy.
  + Where that’s hard to do: Give the plaintiff his costs so far and put the burden on the defendant to show the profit/loss. Presume he would have at least broken even. Restatement § 349.
* Lost-volume sellers: a subsequent sale is not actually a replacement but rather a sale that would have happened anyway (UCC §2–708(2)).

### Vitex Manufacturing Corp. v. Caribtex Corp., 1967 (p.609)

Facts: Vitex processed the wool for Caribtex to export it to the U.S. to take advantage of a tax loophole. No goods were delivered by Caribtex and breach was sought. Question: are overhead costs to be considered?

Holding: Overhead costs are not to be considered.

Rationale: The reason the overhead cost is hard to calculate is due to Caribtex’s wrongful conduct; they should not profit from that fact. Overhead costs are fixed so they are not a part of seller’s cost (they would not have been saved had the contract been performed)

### Laredo Hides Co., Inc. v. H & H Meat Products Co., Inc., 1974 (p.613)

Facts: H&H failed to deliver hides after a lapse between the check was mailed and when it was received. Laredo contracted with a third party to cover.

Holding: The buyer is entitled to recover the difference between cover and the contract price.

Rationale: UCC § 2–712 allows for cover. Burden of proof is on the seller to show that cover was not properly obtained. Under §2–715, Laredo couldn’t just pile up losses of consequential damages. They must reasonably cover.

### R.E. Davis Chemical Corp. v. Diasonics, Inc. (p.620)

Facts: Davis, the buyer, breached with Diasonics due to a breach with a contract it had with doctors. Diasonics resold the equipment for a third price but argued they were a lost-volume seller.

Holding: If Diasonics can show it could have made another sale and profited from it, then it is entitled to § 2–708(2) damages, which includes costs.

Rationale: As a lost-volume seller, Diasonics would only make the next product if it had a buyer so it is in a unique situation. §2–708(1) is inadequate for expectation damages.

### United States v. Algernon Blair (p.626)

Facts: Subcontractor attempting to recover in quantum meruit because of the breach of the prime contractor. Subcontractor would have lost $37k if it had completed performance

Holding: Prime contractor must pay for the reasonable value of the performance.

Rationale: The prime contractor has retained benefits without having fully paid for them. Reasonable value is the amount for which the services could have been purchased.

**Rule: Profit or loss is irrelevant to reliance damages**. **Plaintiff can choose restitution or expectation (Restatement § 373).**

Notes: The contract price acts as a ceiling in these cases. Also, the plaintiff must reduce the restitution by the amount of any benefits it has received.

## Punitive Damages

* Punitive damages may be granted for tortious conduct that is sufficiently “outrageous.” p.26
* See Restatement §355: punitive damages are only available for tortious conduct which accompanies the breach.
* The tort of “bad faith breach” includes insurers who are not willing to settle claims (*Comunale v. Traders & Gen. Ins. Co.*, 328 P.2d 198 (Cal. 1958) and may be extended beyond this field to cases where contractors deny the existence of a contract. See Casebook p. 26.

### White v. Benkowski, 1967 (p.23)

Facts: White family was buying water from the well of the Benkowski family. Benkowskis shut off the water on 9 occasions and Whites sue for breach.

Holding: Whites are entitled to compensatory damages ($10) but not punitive damages.

Rationale: Punitive damages may only be used in order to deter future similar conduct. Compensatory damages make the parties whole. Jury found $10 in actual damages, and that should stand. Punitive damages are generally not recoverable for breach of contract.

## Specific Performance

* Specific performance is an exceptional doctrine of equity.
* UCC § 2–716 liberalizes cases which qualify for specific performance.
* In a sale of goods, SP may be used *only* when the goods are unique/cannot be purchased. *Klein v. Pepsico*.
* Courts traditionally refuse specific performances where the contract:
  + Personal services (though there can be an injunction to prevent a person not to work of people other than the plaintiff).
  + Indefinite such that the court cannot frame an injunctive order.
  + Would require a great deal of supervision by the court.
* It is a form of expectation damages
* Only given when remedy at law is not enough
  + When it can be said that money is no substitute.
  + When the performance is unique, money damages are viewed as too speculative.
  + When it is not possible to buy a substitute product
* When money or time is invested in something, we are more likely to give specific performance because breach may be efficient (p.564)
* Cannot be granted for personal services.

### Campbell Soup Co. v. Wentz, 1948, (p.584)

Facts: Wentz fails to deliver the carrots needed for Campbell’s soup which were judged to be unique.

Holding: Specific performance was granted.

Rationale: These carrots could not be replaced (their product would not appear uniform) so no other damages would be adequate. They were unavailable on the open market.

### Klein v. PepsiCo, Inc., 1988 (p.588)

Facts: Klein offered to buy a jet from PepsiCo and it was accepted (a contract was formed). PepsiCo agreed to pay to repair the engine but when it was returned to New York, PepsiCo Chairman asked that it be withdrawn from the market and they reneged.

Holding: Money damages would be perfectly adequate in this case; he can buy the plane from another seller

Rationale: Klein’s only arguments are that prices have gone up (not a good enough reason for S.P.), the planes are scarce (there are a few on the market), and he invested time (can be paid for by damages).

### Morris v. Sparrow, 1956 (p.593)

Facts: Morris seeks specific performance for a horse he agreed to buy which he spent time training.

Holding: Specific performance should be granted.

Rationale: The time he spent training the horse makes it a unique good.

### Laclede Gas Co. v. Amoco Oil Co., 1975 (P.596)

Facts: The contract had an automatic one-year extension unless it was cancelled. Amoco terminated the contract, stating the contract was unenforceable for lack of mutuality of termination rights.

Holding: The contract is enforceable because Laclede’s intent was to have a long-term supply. Specific Performance

Rationale: Laclede probably could not have found another long-term contractor.

### Northern Delaware Industrial Development Corp. v. E.W. Bliss Co., 1968 (p.601)

Facts: Phoenix Steel sough an order to have Bliss put 300 more workers on the job to make up a full second shift to finish more quickly.

Holding: No specific performance because it would be impractical.

Rationale: It could not be enforced and it is impractical to ask the company to do that.

### Walgreen co. v. sara creek property Co.

Facts: Mall promised not to lease the space to another store operating a pharmacy. Walgreens sought injunction against Sara Creek’s attempt to install Phar-Mor in the mall

Holding: A judge must compare the costs and benefits of breach and specific performance.

Rationale: It would be efficient to breach if Sara Creek would make more money to open the new store than if it stayed with Walgreens’s contract.

Notes: Injunctions avoid the uncertainty of determining monetary damages and incentivizes party-driven negotiation but is costly and only allows the parties to deal with one another (lack of alternatives increases the bargaining range).

## Avoidability

* An aggrieved promisee cannot recover loss it could reasonably have avoided (but there is no duty to mitigate loss).
  + Reasonably avoid some of the loss by buying on the market
  + There is no duty to mitigate loss but you won’t be compensated for needless losses.
* Classic case is *Virtue v. Bird* in which the deaths of the horses need not have occurred (he could have brought them water, etc.
* Avoidability is getting at the “loss in value” portion of the expectation damages cost.

### Rockingham County v. Luten Bridge Co., 1929 (p.630)

Facts: County contracted with bridge company, which had expended $1,900 in costs at the time when county attempted to cancel construction. Luten spent $18,317.07.

Holding: Notice of breach should be a clear sign to the builder that they should not pile up any more damages.

Rationale: There is a general rule that plaintiffs cannot be held liable for damages which need not have been incurred.

### Tongish v. Thomas

Facts: K1: Tonish produces seeds and sells them to Coop. Coop has K2 with Bambino (buyer of seeds). When the market price changes, Tongish breaches and sells to Thomas in K3. There was a failure to cover by Coop after the breach.

Holding: It is more efficient to the market to discourage the breach of contracts generally so the contract is upheld.

Rationale: The purpose of contract damages is to make the party whole, not penalize the breaching party. In this case, Coop would be piling on losses by covering.

### Parker v. Twentieth Century Fox Film Corp

Facts: Fox offers actress another movie when it decides not to produce the picture from the original contract.

Holding: The second offered contract was inferior to the first so it may not be used as mitigating damages.

Rationale: While the plaintiff has a duty to use reasonable efforts to find other employment, the new job was different and inferior so she should not be required to take it.

## Nonpecuniary Loss and Cost of Completion

* Where losses are too speculative to be assessed, the plaintiff can be awarded the cost of completing the performance.
* Where this is disproportionate to the loss to the plaintiff, courts may award the difference in value of the property.

### Jacob & Youngs v. Kent, 1921 (p.645)

Facts: Plaintiff built a home and requested Reading pipe but defendant used Cohoes pipe (distinguished only by the name stamped on it). The value is only slightly different and it would be extremely expensive to replace.

Holding: Court will use loss in value, not cost of completion.

Rationale: When the products are of equal quality, the measure is not for the full cost of reconstruction. Awarding market prices would be a windfall for the plaintiff (who won’t use the money to replace the pipe anyway).

### Groves v. John Wunder Co., 1939 (p.648)

Facts: Wunder leased the land from Groves and agreed to leave it at a uniform grade. Land values plummeted during the great depression and the cost of completion is less than the value of the land.

Holding: Cost of completion will be awarded in cases of “willful breach.”

Rationale: It would be rewarding bad faith to let the defendant get away with this. Just because what you want has no value doesn’t mean the contract shouldn’t be carried out. Plaintiff paid for the excavation ex ante by accepting a lower price for rent.

### Peevyhouse v. Garland Coal & Mining Co., 1963

Facts: Garland agreed to perform remedial work after mining the plaintiffs’ property but it would cost $29,000 to do that and the value of the land would only increase by $300.

Holding: Ordinarily, damages are the cost of performance but when the provision in question was merely incidental to the main purpose and there is disproportionality, the damages are limited to the diminution in value.

Rationale: The purpose of contract damages is to make the party whole, not penalize the breaching party. In this case, Coop would be piling on losses by covering.

## Foreseeability

* Foreseeability originated as a way of curbing jury discretion
* Restatement 351 and 352 frames foreseeability in terms of what is “probable.”
* UCC § 2–715(2)(a) uses the language “had reason to know.”
* This is less strict than the Tort requirement because in contracts, you have an opportunity to warn the other party.
* Lost profits are generally considered foreseeable in cases of resale.
  + They are not awarded when they are:
    - Not part of the original contemplation, or
    - Too speculative
* Difficulty in determining damages does not bar their recovery (e.g. cases of sentimental value)
* Consequential damages are those resulting from the circumstances surrounding the contract and its breach.
* Emotional distress is not typically awarded (p.670). Punitive damages make more sense, if anything.
  + Exception: a contract that is personal in nature and is so couple with mental concern that it is reasonably likely to result in mental anguish or suffering.
* Tacit agreement test (Holmes): what did the parties actually agree to? Was it in their contemplation?
  + The Kenford decision is a NYS anomaly and is rejected by the UCC.

### Hadley v. Baxendale, 1854 (Exchequer), p.657

Facts: Plaintiff was forced to shut down his mill because the defendant was slow in delivering a part to be repaired.

Holding: Defendant should only be liable which for circumstances which would be foreseeable (that which he should have contemplated).

Rationale: If the defendant didn’t know that it was causing the mill to be shut down, how can he be held accountable for damages as such?

Rule: Restatement 351 and 352 frames foreseeability in terms of what is “probable.”

### Kenford Co. v. County of Erie, 1989 (p.664)

Facts: Kenford sues for loss in value of land around the area where a stadium was to be built by Erie County.

Holding: Kenford is not entitled to recovery since there is no evidence that at the time of contemplation, the county assumed liability for those damages.

Rationale: When lost profits are not part of the contemplation or are too speculative, they are not awarded. Kenford assumed the risk.

## Certainty

* Modern contracts law only requires “reasonable certainty.”
* There must be some form of proof (jury can’t just guess).
* Some courts have awarded damages for lost chance or lost reputation (p.673)
  + Both are generally denied by American courts.
* Statisical analysis can inform the certainty question with expert testimony to show what type of profits might have been had

### Fera v. Village Plaza, Inc., 1976 (p.674)

Facts: Plaintiff intended to open a “book and bottle” shop but plaintiffs were refused the space because the lease was misplaced and it was rented to other tenants. Jury awarded $200,000.

Holding: Jury verdict upheld as it was based on something objective.

Rationale: Plaintiff presented sufficient evidence about lost profits and the defendant had a chance to rebut. It’s up to the jury to determine whether the losses are certain enough.

Rule: Juries can decide anything they want for damages as long as it has some objective basis.

## Liquidated Damages

* Contracts concern the redress of breach, not punishment.
* Liquid damages may be used to incentivize on-time completion of the project in question.
* Only worry about overcompensating.
* Promisee must agree to the clauses, of course.
* Liquidated damages give unions a powerful bargaining lever. This can raise the costs of bid prices because contractors are necessarily facing higher risks.
* Liquidated damages clauses are valid as long as the provisions are reasonable.
* UCC § 2–718 says that it must be reasonable either at the time of formation or the time of breach.
* Take-or-pay clauses
  + Take-and-pay: One party is required to take and pay for a minimum quantity of goods.
  + Take-or-pay: one party is required to take or pay for a minimum quantity of goods.
  + It assures cash flow to the producer.
  + Allows flexibility because the buyer can take less and not risk losing a long-term contract.
  + The “pay” part may be unreasonably high but courts don’t consider this to be liquidated damages.

### Wasserman’s Inc. v. Township of Middletown, 1994 (p.680)

Facts: Lease stipulated that if the town cancelled the lease, it would pay plaintiff for any improvement costs and 25% of average gross receipts.

Holding: The lease is enforceable. Renovation costs and damages clause can both be enforced on remand.

Rationale: Liquidated damages are enforceable not as a penalty but as a good faith estimate of actual damages.

Rule: Liquidated damages are enforceable only if they are a reasonable forecast of actual damages.

# Excuses

* Normal remedy for excuses is *avoidance*. If you win, you can avoid the contract, or not, at your option.
* Normally, restitution is in order for excuses. R. § 376.

## Capacity

* If one does not have the legal capacity to incur contractual duties, she is not bound by contract (Restatement § 12(1)).
* Reasons you may be unable to contract (Restatement § 12):
  + Under guardianship
  + Infant (under the age of 18)
  + Mentally ill
  + Intoxicated
    - If the other party has reason to know that he is unable to understand the consequences of the transaction, or
    - Act in a reasonable manner in relation to the transaction.

## Duress

* Definition: impermissible pressure exerted by one party over another either during pre-contractual bargaining or during the attempted renegotiation of an existing deal (p.322).
* Novak definition of duress is coercion, which is based on making a proposition that makes the other side worse off to a normative baseline (how we ought to act)
* Look to Restatement § 175, 176 for approach
  + § 174: physical compulsion
  + § 175: improper threat with no alternative.
  + § 176: wrongful threat precluding free will.
* A benefit gained through duress can sometimes be restored.
* Duress of goods: threats of purely economic injury
  + But it is not duress if it is legal in the first place to take that action.
* You can threaten lawsuit if there’s an actual basis for the suit.
* **Pre-existing Duty Rule: performance of a legal duty owed to the promisor (which is not the subject of honest dispute) is not consideration.** Restatement § 73.
  + In the context of modifications, this turns on issues of good faith and duress.
* UCC § 2–209 is the pre-existing duty rule.
* The rule can be avoided by recission and creation of a new contract.
  + This leads to uncertainty for businesses (what will juries construe as a new contract?)
  + This can only be done for contracts not fully performed (p.330) (Restatement § 89).
  + There must be some consideration, no matter how small (p.336).
* Threats of coercion are not enough, they must be threats of “restraint or danger, either actually inflicted to impending…” p.334.
  + Threats must be considered with relation to the subjective features of the parties.
  + Arguments in favor of one position do not count as duress or threats.
* Threats must “overcome the mind of a person of ordinary firmness.” P.345
* Finding of a confidential relationship is key to avoiding a contract on the basis of overreaching (one side has power)
* Economic duress factors:
  + Threatened to breach
  + No ability to cover
  + Ordinary remedy inadequate.

### Alaska Packers’ Assn. v. Domenico, 1902 (p.325)

Facts: Workmen stopped working and demanded their pay be doubled and attempted to show the fishing nets provided were defective (though this was conflicted). Agent in Alaska accedes to the demands but they are not paid the extra when they return home.

Holding: There was no valid consideration for the modification. There would be no valid consideration for a new contract, either.

Rationale: The plaintiffs already had a legal duty to perform a contract so their performance cannot be used as consideration for a new contract.

Notes: Judge Posner describes this as a temporary monopoly on the labor market, which is definitely coercive.

### Watkins & Son v. Carrig, 1941 (p.331)

Facts: Contract to build a cellar. Builder encounters solid rock. There was an oral agreement to pay nine times the original cost.

Holding: The second contract is upheld.

Rationale: Merger of recission and formation into one transaction does not destroy them. The promise was fair and there was a reasonable value for it. There was a change in the circumstances and a change in the compensation.

### Austin Instrument, Inc. v. Loral Corporation, 1971 (p.340)

Facts: Austin won a bid on the items on which he was a low bidder. Austin says that they will only accept an order for less than all 40 items if the price was increased substantially. Loral is forced to accede rather than breach its contract with the Navy.

Holding: This is duress and the contract is avoidable.

Rationale: Loral met its burden to cover and in this case breach of contract would be inadequate so they seek restitution (on the theory that they overpaid)

## Undue Influence

* R. § 177: when someone is influenced by a person in a persuasive position who has ulterior motives (fiduciary relationship or vulnerable plaintiffs are esp. vulnerable).
* Tests for undue influence:
  + Discussed at unusual place/time
  + Executed at unusual place
  + Demands for immediacy
  + Extreme emphasis on consequences of delay
  + Multiple persuaders
  + No advisors
  + Statements that there is no time to consult.

### Odorizzi v. Bloomfield School District, 1966 (p.346)

Facts: Teacher arrested for homosexuality and is informed that he would be dismissed and the charges publicized unless he resigned. He did but claims it was due to undue influence.

Holding: This is undue influence.

Rationale: There need not be a total weakness which destroys a person’s capacity. The court should evaluate the weakness of one relative to the strength of another. There is a seven-part test on p.349.

## Misrepresentation

* Question is: when A knows something, must he tell B?
* Early U.S. law had no duty to communicate information because it would be difficult to draw the line.
* When there is expense in acquiring information, there is generally not a duty to disclose all the elements of an evaluation (we want to encourage people to become experts)
* Distinct from frustration/impracticability because misrepresentation/mistake is about how the world is now. Frustration/impracticability are about how the world WILL BE.
* Some statutes require disclosure of latent defects or a warranty of habitability
* If you speak about an issue, you must speak truthfully. Half-truths are considered lies!
  + But the recipient must be justified in relying on your statement **(Restatement § 164).**
* **CONCEALMENT**
  + R. § 161: you must disclose when it will:
    - Prevent misunderstanding about a previous assertion
    - Correct mistakes about basic assumptions.
    - Correct mistakes about writing that evidences the agreement.
    - You are in a position of a trust relationship.
* Doctrine of Equitable Estoppel can estop a defendant from claiming that their statement was not the deal.
* Individuals can misrepresent the law with the exception of lawyers (whose judgment is justifiably relied upon).
* The misrepresentation must be material.

### Swinton v. Whitinsville Sav. Bank, 1942 (p.353)

Facts: Defendant knew the house had termites and the plaintiff could not readily observe that fact. There was no false statement.

Holding: Judgment for the defendant; there was no misrepresentation.

Rationale: Moral arguments are not recognized by law; there is no duty to reveal information.

### Kannavos v. Annino, 1969 (p.356)

Facts: House was zoned for single-family but was sold to the plaintiff and represented as a rental property.

Holding: Since they brought up the zoning information, they have a duty to speak truthfully about it.

Rationale: Half-truths are lies; if you speak about something, you must do so honestly.

### Vokes v. Arthur Murray, Inc., 1968 (p.362)

Facts: Plaintiff was wrongly told she was a good dancer and ended up paying over $31,000 for dance classes.

Holding: The plaintiff is entitled to her day in court on this issue because the “opinion v. fact” distinction is meaningless in light of the tricks used against her.

Rationale: In a case of undue influence, there is no defense that only an opinion was given if the plaintiff was being tricked.

## Mistake

* Basic definition: when existing but unknown circumstances impede performance of the contract.
* Relevant Restatement sections: 152, 153, 154.
* Unilateral mistake: R. § 153
  + Voidable if he does not bear the risk of mistake under R. § 154.
  + If one party is mistaken, the nonmistaken party has a duty to relieve when it is reasonable to do so.
* In R. § 152: mutual mistake, both parties are mistaken as to the same basic assumption. This undermines assent.
  + We do not take into account simple regret.
* Wood v. Boynton (p.815)
  + $1 sale worth $700
  + Mutual mistake must go to the very identity of the thing (both sides mistaken about the specific stone being bought). This would only occur if she took the wrong one out of her pocket.
* Sherwood v. Walker (p.815)
  + Barren cow not so barren
  + Neither party intended to buy or sell this cow so the contract can be avoided.
* If you know you should get more information, you must do so (p.817). Courts are not sympathetic if you fail to get information through your own fault.
* *Elsinore* rule: contractor mistake can be rescinded if it is an error of calculation and notice is given.

### Stees v. Leonard, 1874 (p.808)

Facts: Defendants agreed to build a house on lot but it fell down due to quicksand, twice. Plaintiffs seek damages.

Holding: Defendant is liable for breach of contract.

Rationale: You must perform regardless of hardship. You could have limited your liability in the contract if you were smart enough. Argument excluded due to Parol Evidence Rule: Defendant should have drained the land if it was necessary to complete the building.

### Renner v. Kehl, 1986 (p.811)

Facts: Land sold based on mutual mistake that there was enough water to cultivate jojoba.

Holding: The contract may be avoided and the down payment returned and there can be recovery for the reasonable value of improvements on the land.

Rationale: There would not have been a contract save for the mistaken belief that jojoba could be grown there.

## Impracticability

* R. § 261: nonoccurrence of the event was a basic assumption.
* Contracts should impose matching burdens so that each side bears some of the risk of reward/loss (Taylor v. Caldwell)
* Impracticability is due to an unforeseen event (an existing assumption is subject to mistake)
* *Force Majeure* clauses excuse the parties in the case of an act of God, etc. Construed narrowly.
* UCC § 2–613: contract avoided if goods for performance suffer a “casualty” without the fault of either party.
* See UCC § 2–615: you may breach if there is a failure of a basic assumption that an event will not occur.
  + It does not apply if the seller can tender other goods.
* Impracticability requires that there is a more substantial failure than for mistake. Not just a price increase!
* Personal performance is excused for death (sickness too, sometimes) (p.828).

### Mineral Park Land Co. v. Howard, 1916 (p.821)

Facts: Defendant had contracted to take 114,000 cubic yards of gravel from land but found that half of it was below the water table and only paid for what he took.

Holding: When performance was based on the existence of something which no longer exists, performance is excused

Rationale: They assumed the land had enough gravel ready for use. But it became so costly that it was impossible to take.

Rule: “A thing is impracticable when it can only be done at an excessive and unreasonable cost.”

### Taylor v. Caldwell, 1863 (p.825)

Facts: Defendant leased a music hall to the plaintiff for a concert. It burnt down through no fault of either party.

Holding: When a contract becomes impossible because its object has perished, impossibility excuses the borrower.

Rationale: This is implied-in-fact (the parties must have understood that this was the agreement)

### Transatlantic Financing Corp. v. United States, 1966 (p.830)

Facts: Due to the closure of the Suez canal, plaintiff shipper was forced to go around the Cape of Good Hope, resulting in much greater costs. They want the seller (U.S.) to pay for the extra costs.

Holding: Performance of this contract was not legally impossible.

Rationale: You must perform regardless of hardship. The risk was not allocated specifically between parties but the shipper was in the best position to self-insure in case of such an event.

## Frustration of Purpose

* R. § 265: remedy is excuse of performance and restitution in the amount of the benefit conveyed.
* Differs from impracticability in that frustration in no way impedes the contract from being carried out.

### Krell v. Henry, 1903 (p.854)

Facts: Defendant was renting an apartment from plaintiff for the purpose of viewing the coronation of Edward VII. The contract contained no express reference to the event.

Holding: The purpose of the contract is frustrated and it can therefore be avoided.

Rationale: The contract assumes the existence of a coronation ceremony; that was its very purpose. It couldn’t reasonably be foreseen that it would be cancelled.

### Chase Precast Corp. v. John J. Paonessa Co., 1991 (p.861)

Facts: Defendant had a contract to resurface two state highways. Plaintiff was hired to build the medians. When the state cancelled the project, half of the barriers had been produced and paid for but plaintiff is suing for the other half.

Holding: This is a case of frustration.

Rationale: Frustration: when an event neither anticipated by the contract nor caused by either party (without allocating the risk) destroys the object of the contract, the value of performance is destroyed and the parties are excused.

### Northern Indiana Public Service Co. v. Carbon County Coal Co., 1986 (p.866)

Facts: NIPSCO was instructed to find cheaper ways to get electricity and so it stops accepting shipments from CCCC, in spite of their contract.

Holding: This is not an example of frustration because the risk was already assigned.

Rationale: The PSC order did not prevent the use of coal; it prevented a shift of the burden onto the ratepayers. NIPSCO voluntarily assumed the risk of a bad coal contract in this case.

## Remedies for Mistake, etc.

* Courts may hold that only part of a contract is excused, if the contract is divisible.
* R. § 158: Reliance if it will prevent injustice.
* For impracticability and frustration, courts are receptive to a claim for restitution.
  + The maximum award should be the price, not the value.
* Perhaps there is sometimes a duty to renegotiate, but it is definitely better to require renegotiation in the event of perceived risk (p.879).

### Young v. City of Chicopee, 1904 (p.874)

Facts: Contractor had laid wood on the bridge to begin construction when it burnt down, destroying his supplies. He sues for restitution.

Holding: The wood still belonged to the plaintiff; he should be paid for his losses.

Rationale: Liability of the owner should be measured based on the amount of contract work which has so far been done. Since nothing had been done yet in this case, the owner was totally liable for the materials that it requested the plaintiff to bring.

# Unconscionability

* Starting point is UCC §2–302: unconscionable contracts can be voided.
* This doctrine was created after everyone realized that judges were just twisting other doctrines to achieve this end.
* Unconscionability is not to be submitted to a jury.
* Procedural unconscionability: unfairness in bargain
* Substantive unconscionability: review the fairness of the terms of the contract. Controversial!
  + Argument in favor: bargain principle rests on fairness and we must prevent unfairness.
  + Argument against: this should be freedom to contract!
* Informational disadvantage (this is like “weak duress”)
* Public policy is frequently cited vis-à-vis statutes.
* Unconscionability does not get you restitution; only a block on the contract.
* Rent-to-own was found unconscionable because the “rent” was effectively interest (p.503)
* It is more difficult to find unconscionability in business contexts because it’s hard to argue that there is a difference in bargaining position.
* When the contract is “permeated by the unconscionability,” the court cannot simply strike the clause that is problematic.
* **No damages awarded.**

### Williams v. Walker-Thomas Furniture Co., 1965 (p.497)

Facts: Payments applied to one’s account were prorated to pay for each object on the account so it was almost impossible to pay things off.

Holding: This could very well be unconscionable if found by the trial court.

Rationale: Court must look at the ability to understand the contract. Also, if there was no bargaining power, there could not have been consent to all terms.

### Jones v. Star Credit Corp., 1969 (p.503)

Facts: $300 freezer ends up being sold by door-to-door salesman for about $1,400.

Holding: Defendant can keep the $600 that has been paid and plaintiff is required to pay no more.

Rationale: We should resist people taking advantage of the uneducated. In this case, the defendant was more than properly compensated.

### Armendariz v. Foundation Health Psychcare Services, Inc., 2000 (p.509)

Facts: Plaintiffs allege they were discriminated against for their heterosexual orientation but were compelled to arbitrate their claims. The employer was not held to any arbitration requirement.

Holding: The one-sided nature of the contract makes it unconscionable.

Rationale: Employment contracts must be closely scrutinized because employees are at their most desperate time. In this case there was a lack of mutuality (arbitration is not always bad).

### Scott v. Cingular Wireless, 2007 (p.516)

Facts: Contract for arbitration prohibits any class actions.

Holding: Upholding this contract would allow Cingular to get away with wrongdoing.

Rationale: Many class members don’t even know they have a claim or have negative value claims. Barring them from a class action would be unconscionable.